RHB Bank Bhd v Yu Yuan Vegetarian Food Trading Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–3264 OF 1999
MOHAMAD ARIFF J
26 JULY 2010

Banking — Banks and banking business — Loan agreement — Breach of terms of loan agreement — Failure to repay loan — Whether bank had made prior demand on borrower for repayment of loan before filing the action — Whether bank should have given notice to borrower to remedy breach before filing the action — Whether bank should have first proceeded against charged properties — Whether bank's claim for interest null and void for failure to inform borrower of variation in interest rate — Whether amount claimed by bank vague, unproven and baseless — Whether difference of RM100 in sum claimed and sum stated in statement of account displaced conclusiveness of statement of account — Conclusiveness of certificate of indebtedness — Whether bank failed to plead requisite notice of default

Civil Procedure — Pleadings — Material facts — Claim by bank upon borrower's default of loan agreement — Whether sending of notice of default must be pleaded — Whether evidential in nature and need not be expressly pleaded

Evidence — Best evidence — Document — Secondary evidence of documents — Office copies of letters of demand tendered as exhibits — Whether newsprint copies made from original admissible as secondary evidence — Whether mislaid original AR registered cards could be proven by secondary evidence — Evidence Act 1950 ss 63 & 65

At the request of the first defendant and by letter of offer ('LO') dated 2 July 1996, the plaintiff granted to the first defendant banking facilities in the form of a fixed loan and an overdraft. The LO allowed the plaintiff to vary the applicable rate of interest from time to time. A loan agreement and a deed of assignment were executed on 6 August 1996. The second and third defendants executed a letter of guarantee to guarantee payment. The first defendant subsequently defaulted in repayment of the facilities. Letters of demand were then sent by the plaintiff's solicitors to the first defendant and the guarantors. The first defendant and the guarantors failed to settle the sum demanded and hence the plaintiff commenced this action to recover the amounts owing. The first and second defendants, aside from denying liability, raised the following

issues: (i) that the plaintiff's claim was premature on the grounds that under cl 15 of the loan agreement the bank should have given notice to the borrower to remedy the breach within seven days before exercising the bank's remedies; (ii) that the plaintiff's claim for interest was null and void on the grounds that the bank had failed to inform the first defendant of any variation in the interest rate; (iii) that the amount of RM2,230,264.89 claimed by the plaintiff was vague, unproven and baseless; (iv) the admissibility of certain documents which had been merely identified in the course of the proceedings; and (v) that the plaintiff had not pleaded the requisite notice of default under cl 15 of the loan agreement.

Held, allowing the plaintiff's claim:

(1) The first defendant was being sued as a principal debtor, not a guarantor. As such, it was not a pre-condition to liability and to the creation of a valid cause of action that a demand must be made and served on the first defendant. As far as a principal debtor is concerned, the filing of the writ of summons would be regarded in law as a sufficient demand. Clause 14 of the loan agreement conferred the right on the plaintiff to recover the indebtedness without necessarily sending any notice of demand. In any event, notice of default within the meaning of the loan agreement was indeed sent, as were the letters of demand (see para 31).

(2) The defendant's position that the present claim could not be instituted without first proceeding against the charged properties was misconceived. Under cl 16.2.5 of the loan agreement it was pertinent and right to have done so. With specific reference to banking documentation, there is little room for an application of the *contra proferentem* rule given their comprehensiveness (see para 34).

(3) The relevant clauses in the LO and the loan agreement allowed the plaintiff to vary the interest rate with or without notice. On the wording of the LO and the loan agreement, it was patently obvious the plaintiff could vary the interest rate in its wide discretion. The evidence proffered by the plaintiff indicated the first defendant must in all likelihood have known of the interest rates imposed on it (see para 39).

(4) PW1 had during cross-examination stated that the total sum received from the proceeds of sale was RM491,350. The sum reflected in P22 was however RM491,250. Although there was a difference of a mere RM100, this difference constituted a manifest error which would displace the conclusiveness of the statement of account. Although this error was material, it would be a drastic and unacceptable proposition of law if such an error was to lead to a total collapse of the plaintiffs claim which was otherwise legitimate (see paras 45–46).

(5) A certificate of indebtedness operates in the field of adjectival law, and

excuses the plaintiff from adducing proof of debt. The burden is shifted onto the defendant to disprove the amount claimed. The principle cannot mean that if the defendant succeeds in showing a manifest error, the plaintiff has failed to prove the debt owed to it by the defendant. The principle is facilitative and merely creates a presumption of accuracy and reliability unless displaced by proof of manifest error or fraud. It cannot defeat the plaintiffs claim in its entirety when the presumption is displaced (see paras 47–48); *Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading)* [2006] 2 MLJ 685 referred.

(6) Office copies of the letters of demand were tendered as exhibits. The identified documents were newsprint copies kept by the previous solicitors, and newsprint copies being made from the original, they should at any rate be admissible as secondary evidence under s 63 of the Evidence Act 1950 ('Act'). The mislaid original AR registered cards could also be proven by secondary evidence under s 63 of the Act (see para 55).

(7) Given the breadth of cl 14, it was not necessary for the plaintiff to plead the sending of a notice of default. It would fall within the category of relevant facts which was evidential in nature, and thus did not require to be expressly pleaded (see para 62).

[Bahasa Malaysia summary

Atas permintaan defendan pertama dan melalui surat tawaran ('ST') bertarikh 2 Julai 1996, plaintif telah memberikan defendan pertama kemudahan perbankan dalam bentuk pinjaman tetap dan overdraf. ST itu membenarkan plaintif mengubah kadar faedah yang terpakai dari masa ke semasa. Perjanjian pinjaman dan surat ikatan penyerahhakkan telah disempurnakan pada 6 Ogos 1996. Defendan kedua dan ketiga telah menyempurnakan surat jaminan untuk menjamin bayaran. Defendan pertama kemudian telah gagal membuat bayaran balik kemudahan tersebut. Surat-surat tuntutan kemudian telah dihantar oleh peguam plaintif kepada defendan pertama dan penjamin-penjamin. Defendan pertama dan penjamin-penjamin telah gagal menyelesaikan jumlah yang dituntut dan justeru itu plaintif telah memulakan tindakan ini untuk mendapat balik jumlah terhutang. Defendan pertama dan kedua, selain daripada menafikan liabiliti, telah menimbulkan isu-isu berikut: (i) bahawa tuntutan plaintif adalah pramatang atas alasan bahawa fasal 15 perjanjian pinjaman bank patut telah memberikan notis kepada peminjam untuk meremedikan pelanggaran dalam tempoh tujuh hari sebelum melaksanakan remedi bank tersebut; (ii) bahawa tuntutan plaintif untuk faedah adalah terbatal dan tak sah atas alasan bahawa bank telah gagal untuk memberitahu defendan pertama tentang apa-apa perubahan pada kadar faedah; (iii) bahawa jumlah RM2,230,264.89 yang dituntut oleh plaintif tidak jelas, tidak terbukti dan tidak berasas; (iv) kebolehterimaan dokumen-dokumen tertentu yang hanya telah dikenalpasti semasa prosiding;

dan (v) bahawa plaintif tidak memplid notis kegagalan yang diperlukan di bawah fasal 15 perjanjian pinjaman.

Diputuskan, membenarkan tuntutan plaintif:

(1) Defendan pertama telah disaman sebagai penghutang utama, dan bukan penjamin. Oleh itu, ia bukan pra-syarat untuk liabiliti dan untuk membuat kausa tindakan yang sah bahawa tuntutan perlu dibuat dan disampaikan ke atas defendan pertama. Setakat mana penghutang utama adalah berkaitan, pemfailan writ saman adalah dianggap dari segi undang-undang sebagai tuntutan yang mencukupi. Fasal 14 kepada perjanjian pinjaman memberikan hak ke atas plaintif untuk mendapat balik keberhutangan itu tanpa perlu menyampaikan apa-apa notis tuntutan. Dalam apa keadaan, notis kegagalan dalam maksud perjanjian pinjaman sememangnya telah disampaikan, sepertimana surat-surat tuntutan (lihat perenggan 31).

(2) Kedudukan defendan bahawa tuntutan ini tidak boleh dimulakan tanpa terlebih dahulu memulakan prosiding terhadap hartanah yang digadaikan telah disalah tanggap. Di bawah fasal 16.2.5 perjanjian pinjaman adalah berkaitan dan wajar untuk berbuat demikian. Dengan rujukan spesifik kepada dokumentasi perbankan, tiada tempat untuk permohonan rukun *contra proferentem* berdasarkan sifat komprehensifnya (lihat perenggan 34).

(3) Fasal-fasal relevan dalam ST dan perjanjian pinjaman membenarkan plaintif mengubah kadar faedah dengan atau tanpa notis. Berdasarkan susunan kata ST dan perjanjian pinjaman, adalah jelas plaintif boleh mengubah kadar faedah dengan budi bicaranya yang luas. Keterangan yang diberikan oleh plaintif menunjukkan defendan pertama boleh dalam semua kemungkinan mengetahui tentang kadar faedah yang dikenakan ke atasnya (lihat perenggan 39).

(4) PW1 semasa pemeriksaan balas menyatakan bahawa jumlah keseluruhan yang diterima daripada hasil jualan adalah RM491,350. Jumlah yang digambarkan dalam P22 bagaimanapun adalah RM491,250. Walaupun terdapat perbezaan RM100 sahaja, perbezaan ini membentuk kesilapan besar yang boleh menjejaskan sifat konklusif penyata akaun. Meskipun kesilapan ini penting, adalah kenyataan undang-undang yang drastik dan tidak boleh diterima jika kesilapan sebegini boleh membawa kepada kegagalan tuntutan plaintif yang jika sebaliknya adalah sah (lihat perenggan 45–46).

(5) Sijil keberhutangan beroperasi dalam bidang undang-undang adjektif, dan mengecualikan plaintif daripada mengemukakan bukti hutang. Beban berpindah kepada defendan untuk membuktikan jumlah tuntutan tersebut adalah salah. Prinsip ini tidak bermaksud bahawa jika

defendan berjaya menunjukkan kesilapan besar, plaintif telah gagal membuktikan hutang yang perlu dibayar kepadanya oleh defendan. Prinsip tersebut adalah untuk memudahkan dan hanya membentuk anggapan ketepatan dan kebergantungan kecuali dibuktikan salah dengan bukti kesilapan besar atau fraud. Ia tidak boleh menggagalkan tuntutan plaintif secara menyeluruh jika anggapan itu telah membuktikannya salah (lihat perenggan 47–48); *Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading)* [2006] 2 MLJ 685 dirujuk.

(6) Salinan-salinan pejabat untuk surat-surat tuntutan telah ditenderkan sebagai ekshibit-ekshibit. Dokumen-dokumen yang dikenal pasti adalah salinan-salinan cetakan akhbar yang disimpan oleh bekas peguam, dan cetakan akhbar tersebut yang telah dibuat daripada yang asal, patut diterimapakai sebagai dokumentar sekunder di bawah s 63 Akta Keterangan 1950 ('Akta'). Kad-kad AR berdaftar asal yang tersalah letak boleh juga dibuktikan oleh keterangan sekunder di bawah s 63 Akta (lihat perenggan 55).

(7) Berdasarkan skop fasal 14, plaintif tidak perlu memplid berhubung penyampaian notis kegagalan. Ia akan terangkum dalam kategori fakta relevan yang bersifat keterangan, dan oleh itu tidak perlu diplidkan secara nyata (lihat perenggan 62).]

Notes

For a case on document, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 389.

For cases on loan agreement, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2322–2327.

For cases on material facts, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6091–6093.

Cases referred to

Allied Bank (M) Sdn Bhd v Yau Jiok Hua [2006] 5 MLJ 145, CA (refd)

Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading) [2006] 2 MLJ 685, FC (refd)

Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya [1995] 3 AMR 2337, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 8(1)

Evidence Act 1950 ss 63, 65

Kumar Kanagasingam (Choo Dee Wei with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.

Gan Siew Guat (Yong & Rakan-Rakan) for the first defendant.

Mohamad Ariff J:

INTRODUCTION

[1] This was a case after a full trial in which the plaintiff bank presented seven witnesses as against just one for the first defendant. Neither the second nor the third defendants (who were at all material times the directors of the first defendant) came to court to give evidence for the first defendant. The sole witness for the first defendant was not a director of the first defendant, nor was she an employee of it, at all material times. Indeed, at the material times when the letters of demand and recall of the banking facilities (the subject matter of this action) were sent, she was still studying.

THE IMMEDIATE PARTIES

[2] Although counsel for the first defendant also initially purported to act for the second defendant as well, it was made clear in the course of the proceedings that the second defendant had been adjudicated a bankrupt after the suit was filed. Likewise, the third defendant had been earlier adjudicated a bankrupt. Since no leave of court had been obtained to continue the proceedings against them under s 8(1) of the Bankruptcy Act 1967, the trial subsequently proceeded only against the first defendant. Indeed counsel for the defendants had no locus to appear and defend for the second defendant. The trial was approached therefore strictly as a case involving the first defendant.

DECISION OF THIS COURT

[3] After having considered the pleadings, the evidence presented and the law, and with the benefit of counsel's submissions, I found in favour of the plaintiff's claim and ordered that judgment be entered against the first defendant as prayed in the plaintiff's statement of claim for the following sums:

Fixed loan

[4] RM1,266,134.07 as at 11 October 1999 and interest thereon at 3.50%pa above BLR from 12 October 1999 on monthly rest until full payment.

Overdraft

[5] RM886,797.64 as at 11 October 1999 and interest thereon at 3.50%pa above BLR from 12 October 1999 on monthly rest until full payment. Costs to be taxed were ordered to be paid by the first defendant to the plaintiff.

[6] No judgment was recorded against the second defendant in view of s 8(1) of the Bankruptcy Act 1967, since leave of court was not obtained to proceed against the second defendant.

THE BACKGROUND FACTS

[7] This was a relatively straight forward banking case on the facts, where the first defendant was the borrower and the plaintiff the lender bank. On the plaintiff's pleaded case, and as summarised in the plaintiff's outline of its case, the brief facts of this dispute were as follows.

[8] At the request of the first defendant and by letter of offer dated 2 July 1996, the plaintiff (then known as DCB Bank Bhd) granted to the first defendant banking facilities in the form of (a) a fixed loan of RM1,308,000 and (b) an overdraft facility of RM872,000, which were made subject to the terms and conditions in the aforesaid letter of offer. This letter of offer allowed the plaintiff to vary the applicable rate of interest from time to time. The facility also required that a charge be created over three pieces of property identified as corporate suites in Bandar Taman Miharja, Kuala Lumpur.

[9] A loan agreement and a deed of assignment were executed on 6 August 1996 in respect of the same facilities, which were then made subject to terms and conditions in the loan agreement.

[10] The second and third defendants executed a letter of guarantee on the same date to guarantee on demand payment of monies owed by the first defendant up to the limit of RM2,180,000 (inclusive of interest and charges).

[11] The banking facilities were utilised by the first defendant. The first defendant defaulted in payment, and the amount owing as at 11 October 1999 was RM2,230,264.89, with a further interest chargeable thereafter from 12 October 1999 at the rate of 10.3%pa at monthly rests for the fixed loan and daily rests for the overdraft facility.

[12] Letters of demand were then sent by the plaintiff's solicitors, Messrs Darshan Chong & Company to the first defendant and the guarantors, which letters were dated 18 August 1999 and 15 October 1999 respectively.

[13] The first defendant and the guarantors failed to settle the sum

demanded.

THE RELEVANT PLEADING OF THE PLAINTIFF

[14] For reasons which will become apparent subsequently in this judgment, I quote the relevant paragraphs in the plaintiff's statement of claim:

7. Defendan Kedua dan Ketiga telah melalui Surat Jaminan bertarikh 6 Ogos 1996 menjamin untuk membayar kepada Plaintiff apabila tuntutan dibuat semua wang yang dihutang oleh Defendan Pertama di dalam apa-apa bentuk termasuk bunga, caj, komisen, kos dan lain-lain tertakluk kepada wang pokok tidak melebihi RM2,180,000.00 tidak termasuk bunga dan caj.

8. Defendan telah pun menggunakan kemudahan pinjaman yang ditawarkan dan jumlah terhutang bagi kemudahan tersebut termasuk bunga hingga 11hb Oktober 1999 ialah RM2,230,264.89 dengan bunga selanjutnya dikenakan dan 12hb Oktober 1999 di atas kadar 10.30% setahun di atas kiraan bulanan bagi pinjaman tetap dan diatas kiraan harian untuk kemudahan Overdraf hingga tarikh pembayaran penuh.

9. Surat tawaran juga di antara lain memerlukan Defendan menggadaikan harta yang dikenali sebagai Lot-Lot No. A-3-6, A-GR-2 dan A-2-6 Block A, UE3 Corporate Suites, Bandar Taman Miharja kepada pihak Plaintif.

10. Melalui Peguamcara Tetuan Darshan Chong % Co Plaintif telah mengeluarkan surat tuntutan bertarikh 18 Ogos 1999 dan 15 Oktober 1999 kepada Defendan Pertama, Kedua dan Ketiga dan meminta pembayaran semula tersebut tetapi sehingga kini Defendan Pertama, Kedua dan Ketiga telah gagal, enggan dan/atau cuai untuk membayar balik hutang dibawah pinjaman tersebut.

11. Walau beberapa permintaan dan tuntutan dibuat kepada Defendan Pertama, Kedua dan Ketiga, mereka juga enggan dan/atau cuai dan/atau gagal membayar wang tersebut atau sebahagian daripadanya.

Oleh demikian Plaintiff memohon untuk Penghakiman seperti berikut:

(1) Wang berjumlah RM2,230,264.89 sehingga 11 Oktober 1999;

(2) Bunga diatas kadar 10.30% setahun diatas kiraan bulanan bagi pinjaman tetap dan di atas kiraan harian bagi Kemudahan Overdraf dan 12hb Oktober 1999 hingga tarikh pembayaran penuh;

(3) Kos; dan

(4) Apa-apa relief lain yang Mahkamah ini anggap wajar dan perlu …

[15] Thus, from the plaintiff's pleading, this was a straightforward case of a default on banking facilities by the borrower resulting in a recall of the facilities by the plaintiff. The borrower and the guarantors, upon demand being made, had failed to repay the outstanding amount due and payable to the plaintiff together with agreed interest, and hence ought to be made liable pursuant to this action.

THE CERTIFICATE OF INDEBTEDNESS

[16] In this regard the plaintiff submitted a certificate of indebtedness (see cl 5.4 of the loan agreement):

> A statement issued by the Bank and signed by any of its officers as to what at any time is the amount and rate of interest chargeable shall save for manifest errors be final and conclusive and shall not be questioned on any account whatsoever.

(Exhibit P22; statement of amount owing as at 5 April 2010) which provided a total outstanding as at 5 April 2010, which was RM5,410,829.59. By the certificate of indebtedness, a common rate of interest was imposed both in respect of the fixed loan and the overdraft, namely interest at 3.5%pa above BLR from 12 October 1999 to 5 April 2010 on monthly rest. The details in this certificate of indebtedness were as follows:

STATEMENT OF AMOUNT OWING AS AT 5/4/2010

BORROWER: YU YUAN VEGETARIAN FOOD TRADING SDN BHD

GUARANTOR: TAN YOO JOO

Term Loan	
Total outstanding as at 11/10/1999:	RM 1,266,134.07
Add Interest @ 3.50% p.a. + BLR from 12/10/1999 to 5/4/2010 on monthly rest	RM 2.277.747.11
Subtotal	RM 3,543,881.18
Overdraft	
Total outstanding as at 11/10/1999	RM 886,797.64
Add Interest @ 3.50% p.a + BLR from 12/10/1999 to 5/4/2010 on monthly rest	RM 1,421,983.08
Add Other charges	RM 491.250.00
Less Payment Received	RM 1,866,948.41
Subtotal	RM 1,866,948.41
Total outstanding as at 5/4/2010	RM 5,410,829.59

[17] As can be noted, there was a figure of RM491,250 constituting 'payment received', ie reflecting the proceeds from the sale of the charged properties as at the date of the statement. This figure became the subject of challenge by the defendant's counsel, a matter which will be alluded to subsequently in this judgment.

THE FIRST AND SECOND DEFENDANTS' CASE

[18] The first and second defendants, aside from denying liability altogether in the common defence filed, raised three main issues. In relation to the blanket

denial, the defendant denied that the loan facilities were granted by RHB Bank, but were instead granted by DCB Bank. This was a non-issue. The RHB Bank is and was the successor bank to DCB Bank.

THREE MAIN ISSUES

[19] The three main issues raised were the following:

(a) the plaintiff's claim was allegedly premature;

(b) the plaintiff's claim for interest was null and void; and

(c) the amount of RM2,230,264.89 as at 11 October 1999 claimed by the plaintiff in the statement of claim was vague, unproven and baseless.

[20] In addition to these three main issues, there was a challenge mounted by counsel for the defendants on the admissibility of certain documents which had been merely identified in the course of the proceedings. These contested documents were related to the evidential aspects of the first main issue. This issue on admissibility will be addressed separately.

Alleged premature claim

[21] The ground of premature claim was grounded on cl 15 of the loan agreement (see pp 123 – 160 of bundle D, exh P4). By the first defendant's reading, this particular provision provided that in the event of a breach by the first defendant, the bank should forthwith give notice to the borrower to remedy the breach within seven days. In the event the borrower failed to comply with the notice, then the bank could proceed 'to sell the said property' or to 'exercise the Bank's other remedies' as provided under cl 16.

[22] Clause 15 states:

> In the event of any breach by the Borrower of any of the agreements, covenants, and terms, stipulations and undertakings herein contained and on the part of the borrower to be observed and performed (including the agreement or covenant to pay the sums for the time being owing to the Bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days, it shall be lawful for the Bank forthwith to give notice to the Borrower requiring the Borrower to remedy the said breach within a period of not more than seven (7) seven days and warning the Borrower that if the notice has not complied with the Bank will proceed to sell the said property and/or to exercise the Bank's other remedies hereinafter described.

[23] Clause 16 then provides:

If the Borrower shall have failed to pay the sums for the time being owing to the Bank upon demand made by the Bank or to remedy within the period specified in the notice served pursuant to Clause 15 hereof, the breach complained of in the said notice, the Bank shall have the following rights and powers:

16.1 Termination of Licence

…

16.2 Power of Sale

…

16.3 Power To Grant Tendencies

…

16.4 Power To Accept Surrenders …

[24] The short point taken by the first defendant was therefore there was no notice of default sent to the first defendant to remedy the breach, and as such the claim was premature. This was so despite the existence of the letters of demand tendered during the course of the trial and marked as exhs P23 and P24.

[25] The contents of these two letters from the plaintiff's solicitors (see pp 2 – 3 and 6 – 7 of bundle D3) are important to note. They are reproduced below. The sequence of dates was of great significance during the trial.

[26] Exhibit P23 (letter dated 18 August 1999):

You Yuan Vegetarian Food Trading Sdn Berhad

…

18 August 1999

Ordinary Mail

AR Registered

Dear Sirs

Re: Fixed Loan of RM308,000.00 & Overdraft of RM 872,000.00 Total outstanding sum of RM2.214.085.87 as at 10.8.1999

We act for RHB Bank Berhad of No. 498.0.3, 498.0.4, 498.1.3 & 498.1.4, Block A, Wisma Indah, Jalan Tun Razak, 50400 Kuala Lumpur.

We are informed by or clients that you have failed/refused and or neglected to respond to our letter of demand dated *23rd July 1999*. (Emphasis added). This letter dated 23rd July 1999 was identified as 'ID7', and as subsequently in this judgment, was admissible as secondary evidence).

As such we have been instructed by our clients to recall the entire loan facility granted to you, breakdown of which is as follows:

Loan outstanding:	
a) Fixed Loan	RM 1,270,378.83
b) Interest due	65,160.13
c) Overdraft Facility	878,546.91
Amount outstanding as at 10/8/99	RM 2,214,085.87

Please be advised that as at 10.8.1999, the total sum due and owing by you to our clients is in the sum of RM2.214,085.87.

Take note that interest will be charged at 10.75% p.a. (3.5% plus BLR, which is presently at 7.24% on monthly rest from 11th August 1999.

Take Notice that we have been instructed to give you notice which we hereby do that unless the said sum of RM2,214,085.87 together with accrued interest thereon and our legal fees of RM75.60 are pad to us or to our client within SEVEN (7) days from the date of receipt of this letter we have our clients' strict instructions to commence legal proceedings deemed necessary for the recovery thereof without further reference to you and in which event you shall be liable for further costs and interest.

We have been further instructed to inform you that in the event you make any partial payment not in accordance with our demand, then the same shall be accepted by our client on a Without Prejudice basis to continue with the recovery of the loan/legal proceedings.

Yours faithfully,

…

c.c. RHB Bank Berhad

(Ref: JTR 960046)

[27] Exhibit P24* (letter dated 15 October 1999):

You Yuan Vegetarian Food Trading Sdn Berhad

15th October 1999

Ordinary Mail

AR Registered

Dear Sirs

Re: Fixed Loan of RM308.000.00 & Overdraft of RM872.000.00

Total outstanding sum of RM2,230,264.89 as at 11.10.1999

We act for RHB Bank Berhad of No. 498.0.3, 498.0.4, 498.1.3 & 498.1.4, Block A, Wisma Indah, Jalan Tun Razak, 50400 Kuala Lumpur.

We are informed by or clients that you have failed/refused and or neglected to respond to our letter of demand dated 18 August 1999.

As such we have been instructed by our clients to recall the entire loan facility granted to you, breakdown of which is as follows:

Loan outstanding:

a)	Fixed Loan	RM 1,266,134.07
	Interest due	77,212.53
	Late charges due	120.65
b)	Overdraft facility	886,797.64
Amount outstanding as at 11 /10/99	RM 2,230,264.89	

Please be advised that as at 11.10.1999, the total sum due and owing by you to our clients is in the sum of RM2,230,264.89.

Take note that interest will be charged at 10.30% p.a. plus BL, which is presently at 6.80%) on monthly rest from 12 October 1999.

Take Notice that we have been instructed to give you notice which we hereby do that unless the said sum of RM2,230,264.89 together with accrued interest thereon and our legal fees of RM75.60 are pad to us or to our client within SEVEN (7) days from the date of receipt of this letter we have our clients' strict instructions to commence legal proceedings deemed necessary for the recovery thereof without further reference to you and in which event you shall be liable for further costs and interest.

We have been further instructed to inform you that in the event you make any partial payment not in accordance with our demand, then the same shall be accepted by our client on a Without Prejudice basis to continue with the recovery of the loan/legal proceedings.

Yours faithfully,

c.c. RHB Bank Berhad

(Ref: JTR 960046)

[28] As regards these two letters counsel for the first defendant also disputed whether they were sent and received by the first defendant.

[29] The argument indeed was taken one step farther. Even if it was assumed that the plaintiff had issued a notice of default (which the first defendant strongly denied), the aforesaid cl 15 of the loan agreement provided that the bank would only proceed to sell the property assigned to the bank and/or to exercise the bank's other remedies 'hereinafter described'. Relying on the express provisions in cl 16, counsel went argued that the loan agreement only entitled the bank to terminate the licence, exercised its power of sale of the properties, grant tenancies and/or accept surrenders in relation to the properties. In short, the loan agreement as prepared by the bank did not allow the bank to commence a civil suit to recover the debt from the borrower.

[30] With all respect due, I was of the view this reading of the two clauses in the loan agreement was wrong in principle and in law, and further could not even be supported on the evidence presented before the court.

[31] To start with, the first defendant was being sued as a principal debtor, not a guarantor. As such, it is not a pre-condition to liability and to the creation of a valid cause of action that a demand must be made and served on the first defendant as principal debtor. The cases are extremely clear on this. As far as a principal debtor is concerned, the filing of the writ of summons would be regarded in law as a sufficient demand. See *Allied Bank (M) Sdn Bhd v Yau Jiok Hua* [2006] 5 MLJ 145:

> … no notice of demand need even be sent to the respondent who is the principal borrower himself. There is a pre-existing debt which is payable 'on demand' as such a demand, other than the service of proceedings, is not a prerequisite to the bringing of the action to recover the debt. The writ is a notice of demand in itself … We would agree that a separate and proper notice of demand has to be given to a guarantor because he is being sued on a collateral contract but where the borrower himself or the principal debtor is being sued, the writ itself is sufficient demand.

[32] Counsel for the plaintiff referred to cl 14 of the loan agreement to establish that the agreement conferred the right on the plaintiff to recover the indebtedness without necessarily sending any notice of demand. I was in full agreement with this reading of cl 14 which provided:

> The moneys hereby secured shall become immediately repayable on demand being made by the Bank to the Borrower or *without demand* and the discretion of the Bank in any of the following events:-
>
> 14.1 If you or your Guarantor(s) default in payment of any one or more of the Instalments or any interest thereon or other sums of moneys (whether principal or interest) herein agreed or covenanted by the Borrower to be paid; or
>
> 14.2 If fail to make payment of the balance of the moneys owing to the Bank after the expiration of the notice referred to in Clause 3 above or of any Prepayment notice served by the Borrower; or
>
> 14.3 If fail to observe or perform any of the agreements covenants stipulations terms and conditions on the part of the Borrower herein contained or in any other ancillary documents; or
>
> …
>
> then and in any of such cases the principal sum or any interest thereon and all other sums or moneys (whether principal or interest) for the time being owing under this Agreement shall immediately become payable jointly and severally by the Borrower or their personal representatives, successors-in-title or assigns to the Bank and shall be recoverable by the Bank with additional interest thereon as default charges at the rate of 1% per annum (or such other rate as the Bank in its absolute discretion may stipulate) over the FL Prescribed Rate on the total

amount remaining unpaid under the FL and/or at the rate of 5% per annum (or such other rate as the Bank in is absolute discretion may stipulate) over the Bank's Base Lending Rate (as the case may be) on the total amount remaining unpaid under the OD to be calculated and compounded in the manner described in Clause 6 hereof as well after as before judgment from the time of the same becoming payable and notwithstanding that the relationship of banker/customer between the parties hereto shall have ceased for any reason or by any cause whatsoever *and any default in payment by the Borrower or his personal representatives of the principal sum or any interest thereon or any other sums or moneys for the time being owing under this Agreement shall entitle the Bank to recover the same and to exercise the rights and powers upon default herein this Agreement and by law provided without any previous notice to or concurrence on the part of the Borrower.*

[33] Further, as will be alluded to later in this judgement, the notice of default within the meaning of the loan agreement was indeed sent, as were the letters of demand.

[34] I agreed with the argument advanced by counsel for the plaintiff that the defendant's position that the present claim could not be instituted without first proceeding against the charged properties was misconceived. The plaintiff's counsel referred to cl 16.2.5 of the loan agreement. It was pertinent and right to have done so. Banking documents are characterised by their comprehensiveness. It would have been alarming to say the least that the bank could not ever commence civil proceedings without first realising the securities provided to it. It will require clear an express provision to disallow the bank to commence civil proceedings in the manner suggested by counsel for the first defendant. With specific reference to banking documentation, there is little room for an application of the *contra proferentem* rule given their comprehensiveness. Such was the case on the facts of this present trial.

[35] Clause 16.2.5 has a proviso which is crystal clear:

> … Provided always … nor shall this Clause be construed to conclude prevent the Bank from suing the Borrower or defer the right of the Bank to sue the Borrower until after the said property has been sold.

[36] Thus, on the strength of the express provisions in the loan agreement, it was strictly speaking unnecessary to decide, as against the first defendant, whether there was a prior demand in the form of a notice of default or a prior letter of demand prior to recall of the facilities. The filing of the writ of summons itself constituted a demand, and the writ was legitimately filed in law even though the plaintiff did not proceed first against the properties charged.

The claim for interest being allegedly null and void

[37] The first defendant's case on the issue of interest rested on the alleged need to inform the first defendant of any variation in the interest rate, and the alleged failure of the plaintiff to do so. Despite referring to the relevant clauses in the letter of offer and the loan agreement (cl II and 5 respectively), which allows the plaintiff to vary the interest rate with or without notice, the first defendant's position was put thus:

> The Bank cannot unilaterally vary the interest and force the Borrower to accept the variation without knowing when is the variation effective and how much is the variation. That would be tantamount to accepting whatever amount claimed by the Bank to be correct even though the claim is manifestly in error. It would also be akin to forcing the interest rate on the Borrower as the Borrower is refused the right to choose whether to accept the interest rate or to not. (Para 2(b)(v) and (vi) of the first and second defendants' written submission).

[38] Counsel also capitalised on the answer given by the plaintiff's witness (Thean Soon Hin, PW1) who did not provide a conclusive answer when questioned on when the interest rate was varied.

[39] As stated earlier, in banking cases the banking documentation must be taken as the predominant source to consider an issue raised. On the wording of the letter of offer and the loan agreement, it was patently obvious the plaintiff could vary the interest rate in its wide discretion. Even the first defendant referred to cl 5.1(ii) which provided:

> And notwithstanding anything hereinbefore contained *any delay or failure on the part of the Bank to give notice in accordance with the provisions herein contained shall not absolve the Borrower from his obligation to pay the rate of interest and/or commission determined by the Bank.*

[40] In truth, on the evidence presented, the first defendant could not establish its case for lack of its own documentary and testimonial evidence. No director was called to say the company did not receive any notice of variation. Its only witness was still studying even when the demand letters were sent.

> See the following relevant testimony given dining her cross-examination:
>
> A. Q2-Q10, Notes of Proceedings.
>
> 2. Q: In 1996, where were you working?
>
> A: I am not working in the year 1996.
>
> 3. Q: What were you doing in 1996?

A: I am still studying.

4. Q: So these documents lhat shown to you dated 1996 ie pages 76, 114 to 122 and 1 to 38, when all these documents came into existence, you were still studying?

A: Yes.

5. Q: Referpages 123–158 of Bundle D. Earlier you said you haven't looked at it?

A: Yes.

6. Q: Refer page 158, whose signatures are these?

A: The first on under director, I think it's Tan Yoo Joo.

7. Q: How about the second signature?

A: I haven't seen before.

8. Q: Where were you working in 1999?

A: I am still studying.

9. Q: Refer to pages 176–177 and 182–183 of Bundle D and pages 2–3 and 6–7 of Bundle D3. During this time, were you still studying?

A: Yes.

10. Q: Since you were studying, you wouldn't have personal knowledge that company received these letters?

A: I agree. I have no personal knowledge.

B. Q22-Q25. Notes of Proceedings

Court

She wouldn't know. She started working from 20005/2006.

22. Q: What is your relationship with Tan Yoo Joo?

A: I am his sister.

23. Q: Who is Tan YooTuan?

A: He's my brother.

24. Q: Why are your brothers not giving evidence?

A: They went outstation.

25. Q: Are you aware mat Tan Yoo Joo is a bankrupt?

A: Yes, I know.

On the other hand, the evidence proffered by the plaintiff indicated the first defendant must in all likelihood have known of the interest rates imposed on it.

[41] It was in evidence the first defendant in fact wrote to the plaintiff to request for particulars of the amount outstanding. See exhs 13 and 14.

[42] As far as the letters of demand were concerned, they were quite express on the interest rate which were chargeable and at what date.

[43] If it might be noted in passing to show the absence of merits in the first defendant's case, that the claim, now based on the certificate of indebtedness, claimed interest for both fixed loan and overdraft on a rate of interest on monthly rests. In submission, it was argued for the defendant the rate of interest for the overdraft facility had to be on daily rest as agreed. The first defendant was arguing even a more favourable rate (monthly rest) was contractually wrong and detrimental to its case.

[44] Thus, after evaluating the evidence and the law, I concluded even this second ground advanced by the first defendant was without merit. The first defendant could not legitimately argue it should be given the benefit of an ambiguity in the banking documentation arising from the *contra proferentem* rule because there was none.

The amount of RM2,230,264.89 as at 11 October 1999 claimed by the plaintiff in the statement of claim was vague, unproven and baseless

[45] Under this heading the first defendant challenged the veracity of exh P22 (p 1 of bundle D1), principally on account of a reply made by PW1 during cross-examination when this witness stated the total sum received from the proceeds of sale was RM491,350. The sum reflected in P22 is however RM491,250. Although there was a difference of a mere RM100, this difference constituted a manifest error which would displace the conclusiveness of the statement of account. Counsel for the first defendant argued although the difference was small, the court could not apply the *de minimis* principle since the compounding of interest rendered the total amount outstanding as at 5 April 2011 vague and uncertain, and therefore unsafe to rely.

[46] I agreed this error was material, but it would be a drastic and unacceptable proposition of law if such an error was to lead to a total collapse of the plaintiff's claim which was otherwise legitimate.

[47] As stated in numerous decisions, and particularly in *Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading)* [2006] 2 MLJ 685, a certificate of

indebtedness operates in the field of adjectival law, and excuses the plaintiff from adducing proof of debt. The burden is shifted onto the defendant to disprove the amount claimed. The principle cannot mean that if the defendant succeeds in showing a manifest error, the plaintiff has failed to prove the debt owed to it by the defendant. The principle is facilitative and merely creates a presumption of accuracy and reliability unless displaced by proof of manifest error or fraud. It cannot defeat the plaintiff's claim in its entirety when the presumption is displaced. See *Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya* [1995] 3 AMR 2337:

> … the certificate of indebtedness is binding on the defendant unless there is manifest error — See *D & C Nomura Merchant Bankers Bhd v Gunung Kuan Sdn Bhd & 3 Ors* [1990] 2 CLJ 58 and *Oriental Bank Bhd v Jaafar Sidek & Mohd Salam & Ors* [1990] 2 CLJ 72. However, as this case went for full trial, even if it is shown that the certificate is erroneous to a certain extent, it does not mean that the whole certificate must be rejected and the whole claim should fail. This court must consider all the evidence, oral and documentary, and decide whether the plaintiff, on the balance of probabilities, has proved its case and to what extent of the claim (per Abdul Hamid bin Mohamed J (as His Lordship then was) at p 2343 of the report).

[48] On the facts as they stood, there was sufficient evidence to support the claim as pleaded, namely the total amount outstanding as at 11 October 1991, for which the first defendant had not established any manifest error.

[49] Some attempt was also made to dispute the imposition of 'other charges' for a failure to issue a demand for these. I was not of the view the first defendant had a meritorious issue here. These were quit rent, assessment and outgoing solicitor's costs associated with the process of sale of the properties. These were obviously claimable.

[50] On the discrepancy of RM100, the plaintiff, it must be mentioned for completeness, attempted to seek leave of this court to recall PW1 in order to establish the correctness of the sum levied in the statement. The witness had apparently answered based on his calculation of sums representing 10% of the purchase price of each of the properties. According to counsel, the evidence sought to be adduced was to show the sum received in respect of one property was a little more than 10%. This accounted for the RM100 difference. Against the strenuous objection of counsel for the first defendant, I did not allow leave, since the plaintiff had not only closed it case, the trial had reached an advanced stage of oral submissions being heard.

[51] No prejudice would be caused to the plaintiff by the court's refusal since judgment could be recorded for the sum claimed as at 11 October 1991, and the correct figure outstanding at any one time thereafter could be calculated at

the stage of enforcement of judgment. The sum would be a fluctuating sum since the full proceeds had as yet not been received. The first defendant would also have an opportunity to object to the correctness of the sum at this later stage.

THE ISSUES ON ADMISSIBILITY OF THE LETTERS OF DEMAND AND THE AR CARDS

[52] This aspect of the case concerned the following documents:

(a) ID7 (copy of letter of demand dated 23 July 1999 from the plaintiff's previous solicitors to the first defendant);

(b) ID9 (letter of recall dated 18 August 1999 from the plaintiff's previous solicitors to the first defendant);

(c) ID10 (copy of AR registered card of the letter of recall dated 18 August 1999);

(d) ID11(copy of letter of recall dated 15 October 1999 from the plaintiff's previous solicitors to the first defendant);

(e) ID12 (copy of the AR registered card of the letter of recall dated 15 October 1999);

(f) ID16 (copy of letter of demand dated 23 July 1999 from the plaintiff's previous solicitors to the second defendant);

(g) ID18 (copy of letter of demand dated 18 August 1999 from the plaintiff's previous solicitors to the second defendant);

(h) ID19 (copy of ar registered card of letter of demand dated 18 August 1999);

(i) ID20 (copy of letter of demand dated 15 October 1999 from the plaintiff's previous solicitors to the second defendant); and

(j) ID21 (copy of ar registered card of letter of demand dated 18 August 1999).

ID9, ID11, ID18 and ID20

[53] These were office copies of the letters of demand tendered as exhs P23, P24, P25 and P26. I agreed with counsel for the plaintiff that it was strictly speaking unnecessary to rule on their admissibility.

[54] Furthermore, PW6 (Darshan Singh a/l Balwant Singh), who was the maker of these documents, came to court to provide evidence that he had indeed signed these letters. PW6 is a senior partner in the solicitor's firm, and

the supervising partner concerned at the material times, and his evidence was supplemented by the evidence given by PW4 (Gary Wong Kok Yih), who was the previous solicitor in charge of the letters under his portfolio. In these circumstances I had no reason to doubt the truth of their testimony.

[55] The identified documents were newsprint copies kept by the previous solicitors, and newsprint copies being made from the original, they should at any rate be admissible as secondary evidence under s 63 of the Evidence Act 1950:

> Secondary evidence includes —
>
> …
>
> (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy …

[56] PW4 gave evidence to establish that in the plaintiff's previous solicitors' firm (Messrs Darshan Chong & Co) there would be three copies prepared. One would a letterhead copy laid with carbon paper and lastly a newsprint copy which would be an exact copy of the letterhead copy.

ID7 and lD16

[57] The same reasoning as discussed above would similarly apply in relation to ID7 and ID16. Both were office copies of letters of demand dated 23 July 1999. See pp 3–4 and 6–7 of bundle D1. These were admissible as secondary evidence (see also exhs P8 and P17 which are original copies of the AR registered cards duly acknowledged in relation to these letters, which were tendered in evidence. The probability of these letters being sent was thereby enhanced).

[58] On the evidence, these letters would constitute the requisite notice of default.

ID10, ID12, ID19 and ID21

[59] These were photostat copies of the AR registered cards sent together with the letters of demand. The evidence of PW4 and PW6 were again relevant. Both identified these as copies of the original. PW6 for instance confirmed these as copies of the original and further explained the original AR registered cards must have all been mislaid when the firm was preparing for the earlier summary judgment application against the defendants.

[60] I was in full agreement with the plaintiffs contention that this would be

a matter neatly addressed by s 65 of the Evidence Act, which allows secondary evidence to be given to prove the 'existence, contents or condition' of a document, inter alia, when 'the original has been … lost'. Again, I saw no reason to doubt the evidence of respected members of the Bar, and given the surrounding circumstances, the probability was these witnesses were witnesses of truth.

[61] I was therefore satisfied on the evidence these several letters were indeed sent and received by the defendants.

THE ISSUE ON PLEADING

[62] A spirited attempt was made by counsel for the first defendant to argue that the plaintiff had not pleaded the requisite notice of default under cl 15 of the loan agreement. I have already addressed the main issue in relation to cl 15 earlier. Given the breadth of cl 14, it was not necessary for the plaintiff to plead the sending of a notice of default. It was not therefore necessary to support the plaintiff's cause of action, and would fall within the category of relevant facts which was evidential in nature, and thus did not require to be expressly pleaded. The main principles of pleadings are too plain to be elaborately restated here.

CONCLUSION

[63] As earlier stated, the plaintiff's claim was therefore allowed and judgment ordered to be entered against the first defendant as prayed in the plaintiff's statement of claim for the following sums:

Fixed loan

[64] RM1,266,134.07 as at 11 October 1999 and interest thereon at 3.50%pa above BLR from 12 October 1999 on monthly rest until full payment.

Overdraft

[65] RM886,797.64 as at 11 October 1999 and interest thereon at 3.50%pa above BLR from 12 October 1999 on monthly rest until full payment.

[66] Costs to be taxed were ordered to be paid by the first defendant to the plaintiff.

Plaintiff's claim allowed.

Reported by Kanesh Sundrum